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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor,
Plaintiff, Defendant in Error, Petitioner,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue,
Defendant, Plaintiff in Error, Respondent.

## MOTION OF THE ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF THE ALLOWANCE OF PETITION FOR CERTIORARI.

By: JOSEPH E. WARNER,
*Attorney General for Massachusetts.*
State House, Boston, Massachusetts.

L. H. Lane, Law Printer, 221 High Street, Boston.

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# SUPREME COURT OF THE UNITED STATES.

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ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,

*v.*

MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

## MOTION OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes Joseph E. Warner, Attorney General for the Commonwealth of Massachusetts, as *amicus curiae*, and, on behalf of the Commonwealth of Massachusetts, moves that leave be granted to file the brief submitted herewith, in support of the allowance of the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, as prayed for in the case of *Leach, Executor*, v. *Nichols, Collector*, reported in 50 Fed. (2) 787, the petition for certiorari being docket No. 468, October Term, 1931.

## BRIEF IN SUPPORT OF ALLOWANCE OF PETITION FOR CERTIORARI.

### STATEMENT.

The essential question raised in the case at bar is whether or not the tax imposed upon the estates of deceased persons by General Laws of Massachusetts, Chapter 65, is a "claim" or "charge" against the estate or an "administration expense" under Section 203 of the Federal Revenue Act of September 8, 1916, as amended (39 Stat. 777, c. 463; Comp. Stat. 1918, Sec. 6336½d).

Obviously the decision of the question of whether or not the Massachusetts tax is a "charge" against the estate under the Federal Statute must necessarily require an interpretation of the Massachusetts statute, the exact meaning or effect of which is not free from doubt and perplexity.

### STATUTE PRESENTED FOR INTERPRETATION.

*General Laws of Massachusetts, Chapter 65:*

"SUBJECTS AND RATES OF TAXATION."

"Section 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a tax at the percentage rates fixed by the following table: . . ."

. . . . . .

"Section 6. Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for the taxes imposed by this chapter, with interest, until the same have been paid.

"Section 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the state treasurer by the executors, administrators or trustees at the

expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled. . . ."

"Section 9. Property of which a decedent dies seized or possessed, subject to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, shall be charged with a lien for all taxes and interest thereon which are or may become due on such property: . . ."

The interpretation which the Circuit Court of Appeals for the First Circuit has given the Massachusetts Statute, in the case at bar, is in *direct conflict* with the interpretation put upon that same statute by the United States Court of Claims as well as by two decisions of the United States District Court for the District of Massachusetts.

## THE QUESTIONS PRESENTED FOR THE DECISION OF THIS COURT.

**First: Is the tax which the Massachusetts Statute imposes, a tax upon "the passing" or "the transfer" of the property of the estate as the taxable entity; or,**

**Second: Is the tax which the Massachusetts Statute imposes, a tax upon "the succession", "the receipt" or "the right" to each individual legacy or distributive share as an entirely separate and distinct taxable entity?**

Precisely the same kind of questions arose in the case of *Knowlton* v. *Moore*, 178 U. S. 41; 20 S. Ct. 747, which involved the interpretation of the war revenue act of June, 1898 (30 Stat. c. 448, secs. 29–30). In that case this Court held that the Statute imposed the tax on the "particular legacies or distribu-

tive shares and not on the whole personal estate", but in the course of an able and exhaustive opinion Mr. Chief Justice White said:

> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them . . . that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, . . . the following appears: Although different modes of assessing such duties prevail and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

As to the interpretation of the Massachusetts Statute, *supra*, most of the cases in the Federal Courts have arisen under the same Federal Statute as is involved in the case at bar. (Section 203, Revenue Act of September 8, 1916, as amended; 39 Stat. 777, c. 463; Comp. Stat. 1918, Section 6336½d). Some of the Federal decisions have held that the Massachusetts tax is a "charge" or "claim" against the estate, or, in other words, that the tax imposed by the Massachusetts Statute is a tax upon the estate as a whole, whereas in the case at bar it was held that the Massachusetts tax is not a "charge" or "claim" against the estate but is a tax upon each separate legacy or distributive share. Each of these opinions of the Federal Courts cites Massachusetts cases and quotes language of the Supreme Judicial Court of Massachusetts which, if standing alone, seems to sustain its holdings and it is submitted that this fact is the best proof that the attention of this Court has never been drawn to the precise point now at issue.

## ARGUMENT.

### I.

**BOTH THE FEDERAL DISTRICT COURT FOR MASSACHUSETTS AND THE UNITED STATES COURT OF CLAIMS HAVE HELD THAT THE MASSACHUSETTS STATUTE IMPOSES THE TAX UPON "THE TRANSFER OF THE ENTIRE ESTATE", AND NOT UPON "THE RECEIPT OF THE INDIVIDUAL LEGACIES OR DISTRIBUTIVE SHARES".**

Two decisions of the United States District Court for the District of Massachusetts, by different judges, have held that the tax imposed by the Massachusetts statute is a "charge against the estate" as distinguished from a "legacy" or succession tax. The United States Court of Claims has consistently held likewise.

*Thayer* v. *Malley*, 3 Fed. (2) 194 (D. C. Mass., Morton, J.);

*Leach* v. *Nichols*, 43 Fed. (2) 918 (D. C. Mass., Brewster, J.);

*Merrill* v. *United States*, 66 Ct. Cls. 136.

In the case of *Thayer* v. *Malley*, *supra*, the Court said:

"It is contended by the government that there is a distinction between 'estate' taxes and 'legacy' taxes—the former being a tax upon the privilege of transmitting property by will or descent, and latter upon the privilege of receiving it; that 'estate' taxes are deductible, because levied against the estate itself, but that 'legacy' taxes are not deductible, because levied against the legatee; and that the Massachusetts tax is a legacy tax. The Massachusetts statute (G. L. c. 65, § 1) provides that 'all property . . . which shall pass by will . . . shall be subject to a tax', and then imposes taxes varying in amount with the relationship of the beneficiary to the decedent and with the amount of the legacy or distributive share. It makes the administrator or executor personally liable for the taxes which are paid by him and allowed in his account in the probate court. The New York statute (Transfer Tax Law

(Consol. Laws, c. 60) § 220) is similar. Under it, it has been held that a legacy to the United States was taxable because 'the tax is imposed upon the legacy before it reaches the hands of the government' (*U. S.* v. *Perkins*, 163 U. S. 625, at page 630, 16 S. Ct. 1073, at page 1075, 41 L. Ed. 287), and the precise question here presented has very recently been decided in that state in favor of the plaintiff's contention (*Sayre* v. *Brewster* (D. C.) 268 F. 553). The same conclusion has also been reached under the Pennsylvania statute, which is somewhat different. *Lederer, Collector*, v. *Northern Trust Co.* (C. C. A.) 262 F. 52.

It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz. that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the Federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d. The Massachusetts tax ought therefore to have been deducted before the tax on Bayard Thayer's estate was computed."

In the case of *Leach* v. *Nichols, supra*, the Court did not refer specifically to any of the Federal or Massachusetts cases but the language of the opinion leaves no doubt that the tax imposed by the Massachusetts Statute is a "charge against the estate" as distinguished from a "legacy" or "succession" tax, the Court said:

> "It is obvious that the United States has demanded and received a tax levied upon the estate of the plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court."

In the case of *Merrill et al.* v. *United States, supra*, the United States Circuit Court of Claims calls attention to the decisions

of the Supreme Judicial Court of Massachusetts involving the interpretation of the Massachusetts Statute, and says:

> "It is contended by the government that the Massachusetts inheritance tax is imposed upon the privilege of the legatee or distributee to receive property, and that it is therefore not a charge against the estate within the meaning of the statute. The prime question is not whether the tax under discussion is a tax upon the right to transmit property or upon the right to receive property. It is simply whether or not this tax is such a charge as falls within the term 'such other charges against the estate, as allowed by the laws of the jurisdiction under which the estate is being administered'."

Section 1 of the Massachusetts Act provides that:

> "Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for such taxes until the same have been paid. . . ."
>
> "It is further provided by section 4 that such taxes 'shall be payable to the treasurer and receiver general by the executors, administrators or trustees. . . .' All property subject to such taxes was, by the terms of the statute, charged with a lien to secure the payment of same. In the present case the administrators were notified by the proper officer of the commonwealth of Massachusetts that the tax 'became due and payable by *you* to the treasurer and receiver general, . . .' and the administrators paid said tax out of the property of the estate before distribution. Decisions of the Supreme Judicial Court of Massachusetts are cited by both plaintiffs and defendant in support of their respective contentions. Plaintiffs call attention to the decision in the case of *Hollis* v. *Treasurer and Receiver General*, 242 Mass. 163, in which the court referred to the inheritance taxes as 'a pecuniary burden laid for the support of the Government upon the privilege of *transmitting* or *receiving* property by will or by intestate succession.' (Italics ours.) In *Pratt* v. *Dean*, 246 Mass. 300, it is said:

'The tax is imposed not upon the property but upon the right to receive property, by reason of the death of the testator or donor. It is not a property tax, but an excise tax upon the transmission of property.'

"In the case of *Bingham* v. *Commissioner of Corporations and Taxation*, 249 Mass. 79, the court used this language:

'The Commonwealth received by way of succession and legacy taxes under G. L. c. 65, a *contribution from the estate of the decedent*. . . .' (Italics ours.)

"It appears from the decisions cited that the Massachusetts courts have consistently held that the inheritance tax is a tax both upon the right to transmit property and upon the right to receive property. The decision in the District Court of Massachusetts, in the case of *Thayer* v. *Malley*, 3 Fed. (2d) 194, in which was involved the identical question presented here, sustains plaintiffs' contention."

In addition to what is stated above, the opinion in the case of *Pratt* v. *Dean*, 246 Mass. 300, at page 309, contains the following comment by way of direct interpretation of General Laws of Massachusetts, Chapter 65:

"The dominant purpose manifested by the statute is that the aggregate of property or property interests passing to another from one benefactor on his death, whether by will or other donative instrument, shall be treated as a single subject of the excise tax. If this were not so, the purpose of a graduated tax, increasing with the value of the property or interest passing, and with exemptions, could be entirely frustrated by the simple device of splitting a large estate into small parts by trusts and deeds and other instruments of gift, each passing property or property interests not in excess of the exemption. Statutes designed to secure revenue for the support of government ought not to be so interpreted as to be susceptible of being rendered thus ineffectual unless required by plain words.

"This conclusion is reached by interpretation of the tax statute and with full realization of the general principle that tax laws are to be strictly construed, that the right to tax is not to be extended by implication, and that doubts

are to be resolved in favor of the taxpayer. *Eaton, Crane & Pike Co.* v. *Commonwealth*, 237 Mass. 523, 530, and cases there collected."

## II.

### THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT HOLDS THAT THE TAX IMPOSED BY THE MASSACHUSETTS STATUTE IS A TAX UPON "THE RIGHT TO RECEIVE PROPERTY".

In direct conflict with the two decisions of the Massachusetts District Court and that of the Court of Claims referred to above, the Circuit Court of Appeals for the First Circuit, in the case at bar, holds that the Massachusetts tax "is an excise tax on the right to receive property" and in its opinion (50 Fed. (2) p. 790) states:

> "The nature of the Massachusetts tax has been definitely settled, see *Attorney General* v. *Stone*, 209 Mass. 186, 95 N. E. 395; *Boston Safe Dep. & Tr. Co.* v. *Com'r of Corporations and Taxation*, 267 Mass. 240, 166 N. E. 729, 730, which construction was adopted by the United States Supreme Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565, and many other Massachusetts cases, viz. that it is an excise tax on the right to receive property by will, inheritance, or gift, is assessed on the value of the legacy or gift or amount received by the legatee, distributee, or donee, and is ultimately payable by the recipient. G. L. Mass. 1921, c. 65, §§ 17-21."

This decision of the Circuit Court of Appeals appears to be the only instance in which any Court has held that the tax imposed under the Massachusetts Statute is not a proper deduction by the estate for the purpose of the Federal tax and the opinion contains no reference to the reasoning contained in the opinions of the District Court of Massachusetts, in that of the Court of Claims or of the other decisions of the Supreme Judicial Court of Massachusetts which contain language of the same tenor and purport as that contained in the opinion in the case of *Pratt* v. *Dean*, 246 Mass. 300, above referred to.

Both the opinion by the Circuit Court of Appeals in the case at bar and that of the United States Court of Claims in the case

of *Merrill et al.* v. *United States*, 66 Ct. Cls. 136, above cited contain references to two decisions of this Court involving the New York statute which imposes a tax upon the estates of deceased persons, and both opinions seem to be in agreement in holding that the New York statute has the same meaning and effect as the Massachusetts statute.

*Keith* v. *Johnson*, 271 U. S. 1; 46 S. Ct. 415;
*New York Trust Co.* v. *Eisner*, 256 U. S. 345, 41 S. Ct. 506.

In the case of *Merrill et al* v. *United States, supra*, the Court of Claims said:

> "The attention of the court is called to the fact that the decision in the case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345, overruled the Thayer *v.* Malley Case on that point, but it should also be noted that the later case of *Keith* v. *Johnson*, 271 U. S. 1, in turn reversed the ruling in the Eisner Case on the same point. In the case of *Keith* v. *Johnson*, which involved the question of the deductibility of the New York inheritance tax from the gross income of the estate for Federal income tax purposes, the court held that the inheritance tax was deductible, citing with approval *United States* v. *Woodward*, 256 U. S. 632. In *United States* v. *Mitchell*, 271 U. S. 9, decided on the same day, the court confirmed the right of the executor to deduct the Texas inheritance tax from the gross income of the estate, holding that the Texas law was similar to that of New York. In this connection it should be observed that the New York inheritance tax law in its essential provisions is identical with the Massachusetts Statutes and it was so declared in the Thayer-Malley Case."

Without specifically referring to the above comments of the Court of Claims, the opinion of the Circuit Court of Appeals in the case at bar (50 Fed. (2) 787 at p. 791), says:

> "The ruling in the *Keith case* did not reverse the ruling in the *Eisner case*. It merely followed the last construction of the New York Statute by the local Courts."

## III.

**THE UNCERTAINTY AS TO THE MEANING AND EFFECT OF THE FEDERAL STATUTE WHEN APPLIED TO THE MASSACHUSETTS STATUTE, AS INTERPRETED BY THE FEDERAL COURTS, HAS RESULTED IN GREAT CONFUSION AND INEQUALITIES IN THE AMOUNTS OF TAXES EXACTED FROM DIFFERENT MASSACHUSETTS ESTATES ALL IN EXACTLY THE SAME POSITION.**

In this connection we respectfully call to the attention of this Court the situation referred to by Judge Morton of the District Court of Massachusetts in the case of *Thayer* v. *Malley, supra*, where he said:

> "It would, I think, be a decidedly unjust result to hold that under this federal statute the state tax was deductible in one state and not deductible in another, upon a subtle legalism without practical value. The broader view seems to me the sounder one, viz., that such taxes as in fact have to be paid to the state upon the succession are to be deducted before the federal tax is assessed and come within the language of the act as 'other charges against the estate . . . allowed by the laws of the jurisdiction . . . under which the estate is being administered'. Comp. St. § 6336½d."

The States which have statutes which seem to be in all essential respects similar to General Laws of Massachusetts, Chapter 65, and where the Federal courts have held that the estates of decedents were entitled to the benefit of the deduction of the State tax are as follows:

*New York—Keith* v. *Johnson*, 271 U. S. 1, 46 S. Ct. 415.
*Texas—United States* v. *Mitchell*, 271 U. S. 9; 46 S. Ct. 418.
*Pennsylvania—Lederer* v. *Northern Tr. Co.*, 262 Fed. 52; certiorari denied, 253 U. S. 487; 40 S. Ct. 483.
*Maryland—Miles* v. *Curley*, 291 Fed. 761, certiorari not applied for.
*Utah—Kearns* v. *Dunbar*, 292 Fed. 1013; no appeal taken.

*California—Kombst et al.* v. *United States*, Ct. Cls. (unreported, decided November 2, 1931).

The latest decision involving the interpretation of a State Statute was that of the Court of Claims in *Kombst et al.* v. *United States, supra.* In that opinion the Court said:

"The next question which confronts us is whether the inheritance tax paid to the State of California is a charge against the estate, or against those who succeed to the estate. A similar question has been before the Supreme Court on several occasions involving the construction of the inheritance tax statutes of the State of New York (*United States* v. *Mitchell*, 271 U. S. 9) and of the State of Texas (*Keith, Collector*, v. *Johnson, Administrator*, 271 U. S. 1). This court has had a case involving the construction of the inheritance tax statute of the State of Massachusetts (*Merrill* v. *United States*, 66 Ct. Cls. 136). In all of these cases it has been held that the tax is a charge against the estate, and therefore deductible in the estate tax return made to the Federal Goyernment. We have carefully compared the statute of the State of California with the statutes of the other States involved in those cases. We can find no substantial differences. The value of the estate was fixed as of the time of the death of the testator; the tax is due and payable at the death of the decedent; the executors are made responsible for the payment of the tax; it must be paid in eighteen months, otherwise bond has to be given by the executors; no payment can be made to any heir or legatee until a receipt has been filed in court showing the payment of the tax, and other provisions are almost identical with the statutes of the States we have mentioned before. The decisions of the courts of California as to whether this is a transfer or a succession tax are somewhat clouded. In one case, they determine it a transfer tax (*Estate of Potter*, 188 Cal. 55); in another, a succession tax, and in a third, a transfer and succession tax (*Estate of Letchworth*, 201 Cal. 1); but all of the cases are uniform in holding that the amount of the tax is based on the value of the estate at the time of the death of the testator and

that the impairment of the estate by the executors does not reduce the amount of the tax which must be paid on the gross value of the estate at the time of death. (*Estate of Hite*, 159 Cal. 393.) We can see no difference between this statute and that held in the case of *United States* v. *Mitchell* (*supra*); the case of *Keith, Collector*, v. *Johnson, Administrator* (*supra*); and the case decided by this court, *Merrill* v. *United States* (*supra*). We are therefore of the opinion that the amount paid from the estate of Rosa von Zimmermann to the State of California was a charge against the estate and was deductible from the estate tax paid to the Federal Government and the refund claim should have been allowed by the Commissioner of Internal Revenue."

It should also be pointed out, that it would be equally unjust and result in discrimination as between estates within the Commonwealth of Massachusetts if those which resorted to the United States Court of Claims, as in the case of *Merrill et al.* v. *United States*, *supra*, should be granted the benefits of deducting the Massachusetts tax, whereas other similar estates, which were required to pay the Massachusetts tax, should be denied the deduction on the authority of the decision of the Circuit Court of Appeals for the First Circuit in the case at bar.

## IV.

### AN AUTHORITATIVE INTERPRETATION BY THIS COURT OF THE FEDERAL STATUTE AS APPLIED TO THE MASSACHUSETTS TAX WILL BE OF GREAT PUBLIC INTEREST AND VALUE.

It is clear, from all that has been stated above, that an authoritative interpretation of the Federal Statute as applied to the Massachusetts tax will be of great public interest and value. Obviously, such an interpretation by this Court will settle the conflict of opinion which now exists between the United States Court of Claims and the Federal District Court of Massachusetts on the one hand, and the United States Circuit Court of Appeals for the First Circuit on the other.

Although the Federal Revenue Act of 1916 has been super-

seded by later acts and most of the estates, subject to tax under that act and under Massachusetts General Laws, c. 65, have been settled, an interpretation of the Massachusetts statute, in the case at bar, will result in uniformity and equality of treatment under the Federal statutes of such estates, now unsettled, as were required to pay taxes both under the Federal Revenue Act of September 8, 1916, and under General Laws of Massachusetts, c. 65, and will serve as a useful authority and guide in the settlement of controversies and avoidance of litigation as might arise in the application of this Massachusetts statute when involved in Federal taxation.

## CONCLUSION.

WHEREFORE, on behalf of the Commonwealth of Massachusetts it is respectfully submitted that the Petition for Certiorari in the case at bar should be granted to the end that this Court may interpret and definitely settle the meaning of chapter 65 of the General Laws of Massachusetts and the "nature" and incidence of the tax imposed thereby.

Respectfully submitted,

JOSEPH E. WARNER,

*Attorney General,*

*for the Commonwealth of Massachusetts.*

## CERTIFICATION.

I, Joseph E. Warner, Attorney General for the Commonwealth of Massachusetts, certify that the within Motion that the Petition for Certiorari be granted and Brief in support thereof, are filed solely on the grounds of public interest and concern to the officials and citizens of the Commonwealth of Massachusetts; that said Motion and Brief are not filed primarily in the interests of either of the parties involved in the case at bar; that said Motion and Brief are filed to the end that this Court may interpret Chapter 65 of the General Laws of Massachusetts and thereby conclusively settle the great conflict of opinion which exists as to the "nature" and incidence of the tax imposed under the said Massachusetts statute; and that such an interpretation of the Massachusetts Statute by this Court will be of great value to the officials, to executors, to members of the bar, and to the citizens at large of the Commonwealth of Massachusetts.

JOSEPH E. WARNER,
*Attorney General,*
*for the Commonwealth of Massachusetts.*